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STUDY
PROJECT

THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA:
IS IT TIME FOR UNITED STATES PARTICIPATION?

BY

COMMANDER ROBERT G. BREWER, USN

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27 February 1990



U.S. ARMY WAR COLLEGE, CARLISLE BARRACKS, PA 17013-5050

USAWC MILITARY STUDIES PROGRAM PAPER

THE UNITED NATIONS CONVENTION ON
THE LAW OF THE SEA:
IS IT TIME FOR UNITED STATES PARTICIPATION?

AN INDIVIDUAL STUDY PROJECT

by

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U.S. Army War College
Carlisle Barracks, Pennsylvania 17013
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ABSTRACT

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Is it time for United States Participation?

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The attempt to achieve an international consensus on law of the sea is a relatively recent phenomenon. Maritime might has traditionally determined customary law of the sea. Although still significant, the unilateral actions of great maritime nations are no longer the primary factors influencing the development of customary maritime law. Historically, states claimed as much of the seas as they could. Spain, Portugal, Great Britain and the United States rose, each in its own time, to positions of preeminence as sea powers, each enforcing its own version of maritime law in the pursuit of its own national agenda. Maritime might, not general international agreement, maintained those rules as the legal regime of the day.

The two World Wars of the 20th century radically altered the world order. No longer could any one nation hope to dictate what would or would not become law of the sea. States began to unilaterally claim jurisdiction over vast areas of the sea. As claims proliferated, instability increased. States sought a stable legal regime that would allow for the economic exploitation and military use of the seas.

The Third United Nations Conference on the Law of the Sea (UNCLOS III) was convened to codify customary law of the sea and to effect new laws dedicated to the equitable exploitation of the seas for the benefit of mankind. The Conference, reflecting democratization of international relations, tried attempted to reach consensus among all parties on all relevant law of the sea issues. UNCLOS III succeeded in developing a treaty based on a vision of state equality; however, the United States has chosen not to ratify the agreement.

This research paper addresses the historical reservations of the United States with respect to UNCLOS III and attempts to ascertain their relevance in today's politico-economic environment.

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THE UNITED NATIONS CONVENTION ON
THE LAW OF THE SEA:
IS IT TIME FOR UNITED STATES PARTICIPATION?

CHAPTER I
INTRODUCTION

Until the recent attempt by the United Nations to create a "constitution" of the seas based upon a consensus of virtually all nations of the world, law of the sea developed from customary law, based on unilateral state action and treaty law agreed upon by several states. Rather than creating a new legal and political order, these laws and treaties legitimized the accomplished political fact of coastal state control over parts of the ocean or rights of access to the seas. Law of the sea, by its very nature, has always been in a state of flux. It has reflected changes in man's ability to exploit the oceans, in states' perceptions of their economic and security needs regarding the oceans, and in the world balance of power.

The oceans are a vital component of the earth's ecological balance. They provide 70 percent of the earth's oxygen supply, cover 70 percent of the earth's surface, hold 80 percent of the animal life, and are the major determinant in the earth's weather and climate systems.

The oceans are also a valuable economic resource. They provide a vast commercial and military transportation network. Over 95 percent of international trade is carried on the oceans. As international trade increases, especially in the area of vital energy resources, so does the importance of oceanic transportation which is expected to quadruple by the year 2000. Oceanic fishing supplies 15 percent of the world's consumed protein. Marine plants are farmed increasingly for food, chemicals and dyes. Offshore mining operations provide 25 percent of the world's oil and 8 percent of its natural gas. Present estimates indicate that petroleum reserves in the exploitable regions of the seas are greater than those on land. Although oil and gas represent 90 percent of the oceanic yield today, many other strategic minerals and metals are mined from the ocean depths, including tin, barium ore, magnesium, zinc, uranium, molybdenum, manganese, nickel and copper. Commercial mining of deep seabed manganese nodules, technically though not yet economically feasible, will begin early in the 21st century. The economic importance of the oceans is already enormous, and undoubtedly will grow in the future.

Man's earliest uses of the oceans and the corresponding legal regime to govern these activities remained relatively constant for hundreds of years. However, radical changes began in the 20th century. After the Second World War,

nations increasingly began to turn their attentions to the oceans, seeking resources for their burgeoning populations. Rapid advances in ocean science and technology collided with the rising nationalistic fervor attendant the end of colonialism, transforming the ocean environment into a politically volatile arena. Under these pressures, the law of the sea underwent its own rapid transformation. It lost its simplicity as developed and developing nations sought to extend national jurisdiction over vast expanses of ocean, in order to exploit its resources.

Throughout the 1960s and 1970s, the Lesser Developed Countries (LDCs) used the United Nations, and its Third Convention on the Law of the Sea (1972-83), as their forum to espouse their view that the world's oceans were the "common heritage of man". As such, they could not be exploited for the benefit of any one nation or small group of nations. The LDCs saw the wealth of the seas as their means of attaining greater parity with the more developed "Western Block" nations and set out to establish a definitive, internationally recognized legal regime that met that objective (a constitution for the sea). The result is the current version of the United Nations Convention on the Law of the Sea (UNCLOS III). A treaty that virtually none of the developed nations of the West have signed. Yet, 43 of the 60 country ratifications necessary to place the treaty into force, as

legitimate international law, have occurred as of 16 December 1989.

This paper will briefly examine the history of the law of the sea, the United States' reasons for participating in the UNCLOS III negotiations, UNCLOS III itself, the reasons for the U.S. rejection of the treaty, and an analysis of that rejection.

CHAPTER II

EARLY THEORETICAL BACKGROUND

In earlier times states did not attempt to reach consensus on law of the sea. It was power rather than accepted international legal principles that determined the extent of a state's jurisdiction over its adjacent waters. A state would generally claim as much of the seas as it could successfully control and defend. After the actual act of appropriation, civilian legal theorists would introduce principles of law justifying the increased jurisdiction of the state.

The earliest formal statement defining the legal status of the oceans and the rights people possessed therein was made by the Roman jurist Marcianus in the 2nd century A.D. He stated that the sea and the coasts are common to all men and that all men hold a common right to the free useage of the seas and its products. This pronouncement as codified in the Justinian Institutes in 529 A.D. and in the Justinian Digest in 534 A.D. Since in practice the Roman Empire exercised sovereignty over the Mediterranean, it is generally accepted that this doctrine applied to the rights of individual members of the Roman Empire rather than those states in an international community. In contrast to the view of

Marcianus, jurisdiction over the seas was gradually thought of as based upon naval supremacy rather than the right of common use based upon a growing body of international law.¹

Whatever the basis of ocean rights, there could be no denying that control of the seas increasingly enabled a state to bolster its economic, military, and commercial strength in the world. As the seas became more important as a source of food and as a network for military and commercial transportation, especially with the expansion of maritime commerce in the middle ages, competition among states for sovereignty over the seas increased.

13th century Venice, whose vessels dominated the Mediterranean and Middle Eastern trade routes, claimed the entire Adriatic Sea even though it did not control both shores. From 1269 through the 16th century, Venice demanded and received tributes from foreign vessels and reserved the right to prevent transit of the Adriatic. Because other European powers and the Pope recognized the Venetian claim, its sovereignty over the Adriatic became rooted in custom and treaty, and outlasted Venice's ability to maintain control by force.²

After Venice had established its control, jurists again developed theoretical justifications for the extension of seaward jurisdiction. Bartolus de Sassoferrato (1314-1357), an Italian jurist, wrote that any state had the right to

extend its jurisdiction to include offshore islands within a moderate distance from its shores. He defined "moderate" as 100 miles. This concept was later used to claim jurisdiction over adjacent seas even though no offshore islands existed.

Other Mediterranean powers, citing these writings, claimed their adjacent waters as well. Following the Venetian example, the Republic of Genoa claimed sovereignty over the Ligurian Sea. As late as the 17th century, the Supreme Court of Piedmont, basing its decision on the writing of Bartolus, condoned the capture of a Spanish ship by the Genoese in the Ligurian Sea 50 miles seaward of its shore and thus legitimized the Genoese seaward extension.³

Various states of northern and western Europe also claimed and fought over possession of the seas. From the 11th century, Denmark, Sweden, and later Poland disputed control of the Baltic Sea and eventually shared possession of it. On the grounds that they controlled the opposite shores and therefore held sovereignty over the intervening seas, Norway and later Denmark claimed the northern seas between Norway and the Shetland Isles, Iceland, Greenland, and Spitzbergen. Following several wars over the Scandinavian Seas, treaties were concluded concerning the rights of fishing, trading, and navigation in these waters.⁴

As might be expected, the weaker states could not and did not attempt to make claims over their adjacent seas.

Since England, because of Dutch, Spanish, and French competition, could not maintain exclusive rights over its surrounding seas, it naturally supported a policy of freedom of fishing and navigation. This policy allowed it access to the seas and flexibility until it too had sufficient naval power to "flex its muscle" and extend its seaward jurisdiction.⁵

The attempt to maintain closed seas reached its apex in the 15th century when Spain and Portugal conspired to divide the oceans of the entire world between themselves on the basis of several Papal Bulls and the Treaty of Torsedillas. After Portugal had explored the west coast of Africa, Pope Nicholas V showed his appreciation of the Portuguese efforts to convert the heathens by granting Portugal exclusive and permanent rights to Africa. The Spanish exploration of America was similarly rewarded by Pope Alexander VI who had extremely close ties with Spain. In 1493 Pope Alexander VI issued several bulls confirming Spanish claims to the recently discovered islands and lands 100 leagues west of the Azores and Cape Verde. He forbade anyone not granted permission by Spain to travel west of this line.⁶

The Portuguese were decidedly unhappy with this turn of events because it interfered with their ability to navigate around their island territories. They opened negotiations with Spain, in 1494, in an effort to move the dividing line

further west. The outcome of their negotiations was the Treaty of Torsedillas. It divided the known world between them, giving each the exclusive navigation rights in their separate spheres. The treaty was also the "birth" of the concept of "innocent passage" because it allowed Spain to transit the Portuguese sphere in a direct manner to reach the Americas.⁷

The English, French, and Dutch, by this time becoming sea powers in their own rights, began resisting Iberian claims to the oceans of the worlds. Tensions ran high and many confrontations ensued until the English defeated the Spanish Armada in 1588. Henceforth, Spanish sea power waned while British power rose.⁸

The English and Dutch were initially inclined to proceed as had the Iberians. It was only the sound advice of some of Queen Elizabeth's closest advisors, foreseeing the Anglo-Dutch wars of the 17th century, that prevented them from doing so and thus set the stage for the concept of "freedom of the seas".⁹

Hugo Grotius (1583-1645), a Dutchman, is generally considered as the originator of the concept of freedom of the seas. He published a treatise in 1609 entitled Mare Liberum which he used as a vehicle to support the right of the Dutch to navigate on the high seas and engage in their profitable East Indian trade. The importance of Mare Liberum was the

near universal acceptance of its basic tenets; (1) In a true law of Nations, the sea should be called the property of no one (res nullius), or a common possession (res communis), or a public property (res publica), (2) God did not give all things to one or another individual but to the whole human race, (3) The seas are not merchandise and therefore cannot become private property, and (4) Therefore neither a nation nor an individual can claim any right of private ownership over the sea because such a claim would go against nature and public utility.¹⁰

Grotius' ideals withstood the test of time virtually intact. The British and Dutch eventually instituted territorial seas approximating 3 nautical miles (the fall of a 17th century cannon shot), in order to protect inshore fishing rights. But the oceans beyond the territorial seas of the coastal states remain free for community use to this day.

The latter half of the 20th century has seen significant changes in the world view of freedom of the seas. Since the end of World War II, the boom in technology and ocean sciences has vastly increased the use and potential of the world's seas. It has become obvious that the seas are not infinite in their resources and can no longer be used as the earth's garbage dump. Coupled with this new thinking was the demise of colonialism and the emergence of the "have nots" of the Third World or Lessor Developed Nations (LDCs). In the

1960s and 1970s, the LDCs used the United Nations as a platform to espouse their belief that the seas were the "common heritage of man" and as such communal property. No unilateral exploitation of the seas was acceptable for they saw this as a way to reduce the disparity between the "haves" (the industrialized west led by the USA) and the "have nots" (the LDCs).

At the same time the LDCs were establishing the principle of common heritage, The United States and the Soviet Union were locked in the Cold War. The naval strategy of the United States demanded free access to the world's oceans, as did its commercial and trade requirements. The Soviets also had worldwide requirements they sought to codify in international law. When it became obvious that the LDCs intended to develop an "ocean constitution", under the auspices of the United Nations, the two superpowers entered the negotiations to secure their vital security interests.

CHAPTER III

UNITED STATES INTERESTS IN LAW OF THE SEA

"Navies exist for the protection of commerce...seapower is that combination of maritime commerce, overseas possessions, and privileged access to foreign markets that produces national wealth and greatness".¹¹ With those words, Alfred Thayer Mahan illustrates the importance of naval mobility to the economic strength of the United States.

From the beginning of the law of the sea negotiations in 1972, the United States recognized that it had broad interests in a wide range of law of the sea issues, including navigation, fishing, resource exploitation, and ecology among others. However, three specific legal issues concerning United States naval operations were of overriding interest; all others were secondary concerns by comparison: passage through straits, transit along coasts, and military use of the deep seabed. The significance of these issues can be seen highlighted against the four missions of the United States Navy as officially established in 1970 by Admiral Elmo R. Zumwalt, Jr., then Chief of Naval Operations, and as elaborated in 1974 by Vice Admiral Stansfield Turner, then President of the Naval War College.¹² The four missions are

strategic deterrence, sea control, power projection ashore, and naval presence.

Strategic deterrence, then as now, is the most important United States Naval mission. Its objectives are threefold;

- To deter all-out attack on the United States or its allies;

- To face any potential aggressor contemplating less than all-out attack with unacceptable risk; and

- To maintain a stable political environment within which the threat of aggression or coercion against the United States or its allies is minimized.¹³

Naval strategic deterrence is accomplished through use of the Ballistic Missile Submarine, Nuclear (SSBN). The special advantage of the SSBN is its ability to remain submerged and thus undetected for periods of 60 days or more.

The rest of the U.S. naval fleet is mostly committed to the other three missions: sea control, power projection, and naval presence. Sea control is the naval mission closest to the classical role of sea power as propounded by Admiral Mahan at the turn of the century. It means keeping sea lanes open for one's own use while denying them to the enemy. Especially crucial may be the control of choke points such as straits where maritime passage can easily be impeded. The projection of power ashore includes amphibious assault, naval bombardment, and tactical air. These permit naval forces to

participate in wars on land and can be particularly advantageous when troops are not stationed on foreign shores but the nation desires to maintain the capability to conduct foreign operations. Naval presence is "showing the flag" and may include the threatened application of another of the naval missions, especially power projection. Naval power, whether in its politico-military or economic protection role requires mobility. The primary concern of the United States in the UNCLOS III negotiations was loss of mobility in the three areas sighted above.

PASSAGE THROUGH STRAITS

The first legal issue that affected the effectiveness of the United States Navy was passage through straits, specifically international straits. By 1972 many coastal states were claiming territorial seas of 12 nautical miles (nm) or greater. It was obvious to the United States that UNCLOS III would codify at least that distance into the convention. Customary law in effect at the time recognized only a 3nm limit. The effect of the codification of 12nm as international law would eliminate 121 heretofore international straits, bringing them under direct national control of the adjacent coastal states. While transit of territorial straits under the "right of innocent passage" would remain in effect, submerged transit and overflight are specifically deemed not innocent under any version of law of the sea.

Submarines must transit on the surface and aircraft must have prior permission to transit the territorial seas of a sovereign nation. Additionally, passage is considered innocent only "so long as it is not prejudicial to the peace, good order, or security of the coastal state. No state willingly concedes to another the determination of its security".¹⁴ The coastal state, therefore has considerable discretion over the passage of warships through its territorial waters under the right of innocent passage. The prospect of restrictions on naval mobility through straits such as Gibraltar, Messina, Bab el Mandeb, Hormuz, Malacca, and Dover to name just a few, was unacceptable to the United States Government (Nixon Administration). (figure 1)

TRANSIT ALONG COASTS

The second legal issue, transit along coasts, arises because of claims, already mentioned, by coastal states to extend their territorial seas and other zones of national control. Given the traditional 3nm limit on territorial seas, navies could operate freely very near to the land of other countries to "show the flag" and conduct wartime operations just off the coasts of neutral nations. The change to a 12nm territorial sea was not the problem for the United States. It was the indications of "creeping jurisdictionalism" that portended the eventuality of 200nm territorial seas, coinciding to the width of the Exclusive Economic Zone (EEZ).

The United States would demand that the convention stipulate, in no uncertain terms, that that would not be the case.

MILITARY USE OF THE DEEP SEABED

The last issue of great concern to the United States was the issue of the military use of the deep seabed. On December 17, 1970, the General Assembly of the United Nations adopted Resolution 2749(XXV) by a vote of 108 in favor (including the United States) to none against, with 14 abstentions.¹⁵ That resolution declared that the deep seabed was "the common heritage of mankind" and that it should be governed by some sort of international regime. The Informal Single Negotiating Text (ISNT) developed for UNCLOS III included a provision that the deep seabed "shall be reserved exclusively for peaceful purposes."¹⁶

From the point of view of the U.S. Navy it was important that the peaceful use of the seabed not be taken to mean the prohibition of seabed listening devices. The United States attempted to substitute wording that prohibited "weapons of mass destruction", as contained in the 1971 Seabed Arms Control Treaty,¹⁷ in place of the "exclusively peaceful purposes" section of the ISNT.

These three primary issues, each dealing with naval mobility, were the crux of the U.S. approach to UNCLOS III. As an island nation, geographically isolated from its allies and global economic markets, the United States must always

maintain access to the seas.

CRITICAL STRATEGIC STRAITS

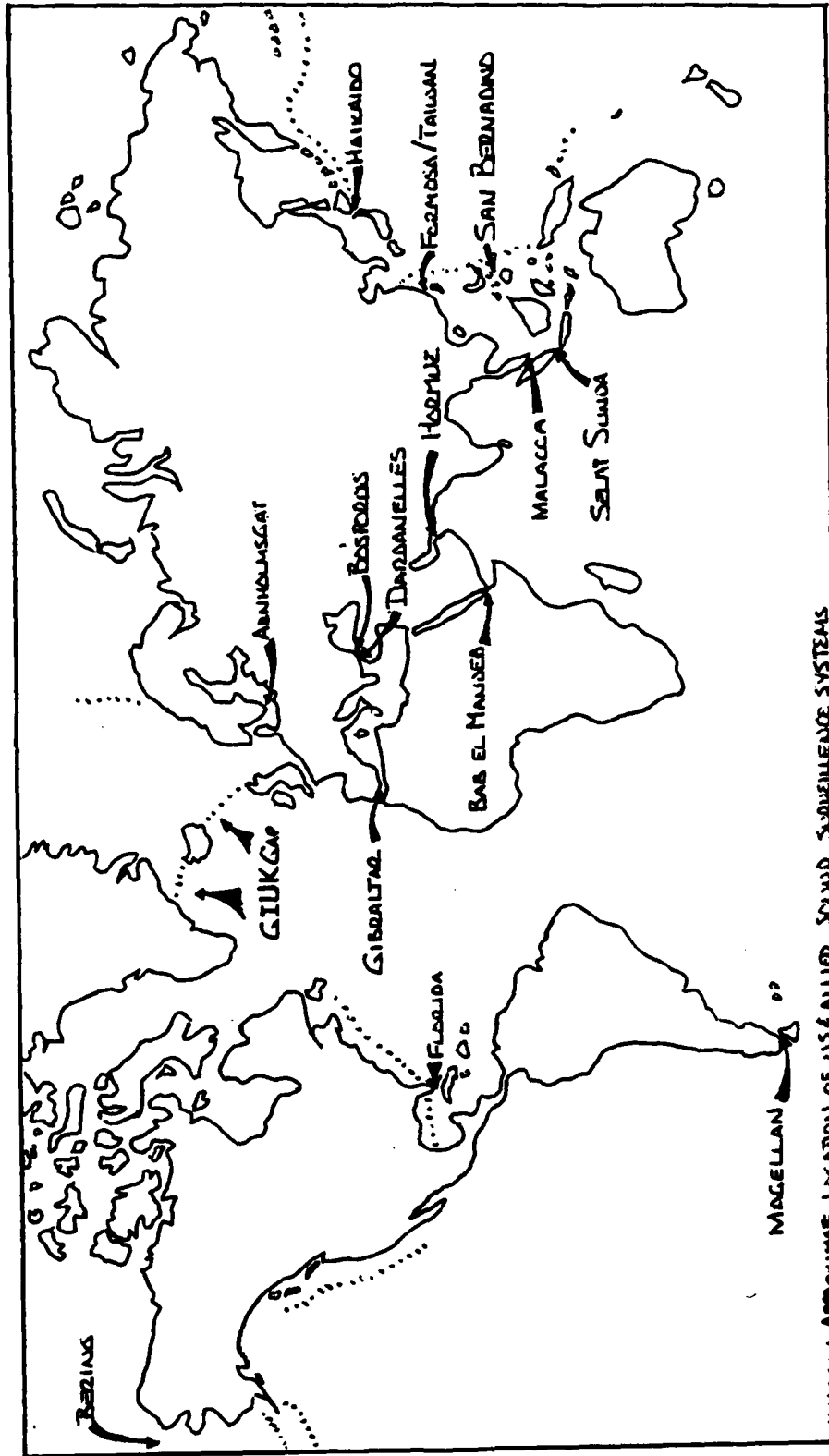


FIGURE 1

CHAPTER IV
UNITED NATIONS CONFERENCES ON THE LAW OF THE SEA
(UNCLOS I, II, III)

As has been previously noted, for the roughly 300 years prior to World War II, the community of nations (at least the dominant Western colonial nations) treated the oceans as being divided into two zones: (1) The vast majority of the ocean was deemed "high seas," where "freedom of the seas" reigned. That is, the high seas were not subjectable to any nation's sovereignty. Each nation was free to use the world ocean for vessel (and in this century, aircraft) navigation and its "inexhaustible" resources (usually fish) without interference or regulation by any other nation. (2) The other zone was the "territorial sea," that narrow border of ocean along the shores of each coastal nation within which that nation could exercise sovereignty almost as absolute as it exercised over its land territory and internal waters. The only exception, of consequence, was the right of any other nation's vessels to "innocent passage" through the territorial sea. Passage was "innocent" so long as it was not prejudicial to the peace, good order, and security of the coastal nation. The breadth of the territorial sea was, by customary international law, three nautical miles.

The two-zone concept, combining an almost unimaginably

large area of free navigation space with narrow areas of innocent passage space, was a very convenient setup for any naval or maritime power. So thought the United States in 1945 as it emerged from World War II as the global naval power. Unfortunately, 1945 was also the year the two-zone system began to change: the fingers of coastal sovereignty began to reach seaward. 18

The catalyst was unilateral action on the part of the United States under the Truman Proclamations. 19 In September 1945, President Truman issued two proclamations. The first claimed United States sovereignty rights to the natural resources of the continental shelves adjacent to U.S. shores. This meant that the United States was unilaterally claiming valuable resources, oil and gas in particular, beyond its three-mile territorial sea out to an average of 45nm. The second proclamation, issued the same day, seemed to assert U.S. regulatory authority over fisheries in the high seas beyond its territorial seas; actually it did not, but the perception by other coastal states was that it was another unilateral extraterritorial claim. 20

The international response, especially from the other coastal states, was extremely positive. They all liked the idea. Chile, Ecuador, and Peru immediately claimed 200nm territorial seas, followed quickly by most other Latin American nations. Twelve mile territorial seas and extra-

territorial fishing zones became fashionable worldwide. The stage was set for the first United Nations Convention on Law of the Sea (UNCLOS I).

UNCLOS I

In the midst of this expansionist trend, of the mid 1950s, the UN International Law Commission, a group of international lawyers tasked with codifying international law, began preparing draft treaties on the law of the sea. The result was UNCLOS I, meeting in Geneva in 1958. The Conference adopted four new treaties, widely viewed at the time as codifications of customary law of the sea:

- The Territorial Sea and Contiguous Zone Convention: reconfirmed coastal states rights with respect to territorial seas, including "innocent passage". It did not address the issue of the breadth of the territorial sea.

- The High Seas Convention: defined "high seas" as all waters seaward of the territorial sea. It lists four specific high seas freedoms:

- Freedom of vessel navigation, including submerged.

- Freedom of overflight.

- Freedom to fish.

- Freedom to lay submerged cables and pipelines.

- The Continental Shelf Convention: codified the

first Truman Doctrine, that coastal nations have sovereign rights to the natural resources of their continental shelves. However, it specifically excluded the waters above the shelves, continuing to treat them as high seas beyond 3nm.

- Fishing and Conservation of Living Resources of the High Seas Convention: designed to both preserve important high seas freedoms and to respond to coastal state concerns about foreign fishing outside their territorial seas.

UNCLOS I, because it failed to address the issue of the breadth of the territorial sea was so non-controversial as to be "vanilla". UNCLOS II was inevitable.

UNCLOS II

UNCLOS II convened in Geneva, in 1960, to specifically address the issue of territorial sea dimensions. The impasse that developed in UNCLOS I could not be broken. The negotiations failed, albeit narrowly, to agree on a maximum breadth of the territorial sea.

UNCLOS III

In the 1960s and 1970s, despite the existence of the Geneva Conventions, the trend towards the seaward movement of coastal jurisdiction continued, and pressures for a new oceanic order mounted. The sources of these pressures were several:

- New ocean technologies meant more and more people were engaged in new activities farther from shore.

- In the wake of global decolonization, more "new" coastal states existed. They were basically poor and without global navies or merchant fleets. They were and are the nations of the Third World.

- These new states were in the vanguard of the search for a New International Economic Order (NIEO), which sought a redistribution of resources and wealth on the planet. This search for a NIEO found coastal nation expansion, especially the claims by poor coastal states to nearby ocean resources and uses that might otherwise be "gobbled up" by the few technologically rich nations, to be consistent with NIEO goals.

- The mid-1960s revelation that manganese nodules on the deep seabed contained such valuable minerals as nickel, cobalt, and copper, together with the growing technological capability for those nodules to be mined, provided the final incentive for a new approach to the international law of the sea (at least in the eyes of the Third world nations). The miners needed a security of tenure system as a prerequisite for profitable mining, and the Third World nations saw an opportunity for a reallocation of a new found source of wealth. 21

The Third United Nations Convention on the Law of the Sea convened in December 1973, after several years of preparatory meetings of the special UN Seabed Committee, and adopted its

treaty in April 1982.

UNCLOS III can justifiably lay claim to being the most significant attempt at global cooperation ever. More than 150 nations gathered together to address 85 agenda items, with a view to negotiating a comprehensive set of legal principles to govern nearly every aspect of use of 70 percent of the planet's surface. The most astonishing thing of all was that the 85 agenda items had, under the Convention charter, to be negotiated as an "all or nothing package"!

The Third World nations, knowing that the leading maritime nation's (USA, USSR, UK, FRG, France...) primary concerns centered on the codification of freedom of navigation and innocent passage statutes, were determined to legitimize the principles of NIEO by holding those concerns hostage in the negotiations. Without Western nation concessions on wealth redistribution, there would be no treaty adopted, and the maritime legal regime would remain as muddled as ever.

The outcome: a comprehensive, very complex treaty of 440 provisions, covering 200 single-spaced pages, resulting entirely from consensus. Not a single vote was taken prior to the vote for adoption of the treaty as a whole, in April 1982.

In December 1982, when the treaty was opened for signature in Kingston, Jamaica, the United States and 22

other nations refused to sign it (117 nations signed and 24 invited nations did not attend the meeting). The 23 nations voting against accounted for over 60 percent of the world GNP at the time. The United States continues to refuse to sign the treaty to this day, voting "no" on the UN General Assembly resolution each and every year. The problem, then and now, is Part XI of the treaty; the section that deals with deep seabed mining.

CHAPTER V

LAW OF THE SEA CONVENTION REJECTED

President Ronald Reagan announced on July 9, 1982 that the United States would not sign the Law of the Sea Convention. He cited as reasons for the rejection only the aspects of the Convention that dealt with the International Seabed Authority and deep seabed mining. The significant reasons for the rejection include the following:

- Access to seabed minerals by private mining companies of the United States and other industrialized countries would be hampered by the treaty's so-called "parallel system." Each private applicant would be required to submit two mine sites of similar value to the ISA, which would then be allowed to choose one of the two for its "bank" while granting mining approval to the applicant for the other site. The "banked" site would then be mined by the ISA's operating arm, the Enterprise, or by a developing country. The U.S. miners and President Reagan viewed the Enterprise as being a favored competitor in the fledgling deep seabed mining business.

- Equally abhorant in Administration eyes, were the financing requirements of the treaty, with respect to the Enterprise. Even with a promising site and seabed mining

technology, the Enterprise would not be able to conduct operations without sufficient financial backing to cover the enormous costs involved in start-up operations (estimated at up to \$2 Billion per site) . The treaty requires that the richer, industrialized nations provide loans on easy terms to the Enterprise, with each countries obligation proportional to its share of the UN budget (the U.S., with 25 percent of the UN budget obligation, would be required to finance 25 percent of the Enterprise's financial burden).

- The Convention places production ceilings on the amount of ore recovery allowable from the deep seabed in order to protect the price of land recovered ores and minerals.

- The treaty fails to guarantee the United States a seat on the ISA Council. This was especially irritating in light of the treaty's guarantee of three seats to states from the Eastern European region. This was thought to be tantamount to giving the USSR three votes.

- The treaty calls for the mandatory transfer of seabed mining technology to the Enterprise by mining concerns.

- The treaty provides for a review conference 15 years after operations begin. A three- fourths majority of the council could change the seabed regime at that time to reflect current conditions. The U.S. seriously objected to

that provision in that the regime could be changed without concurrence of the United States, much less the with Senate advice and consent. A U.S. fear is that these amendment procedures could be used in the future to "lock-out" U.S. private mining concerns and create an ISA-Enterprise monopoly, controlled by the Third World.

- The U.S. objected to National Front organizations, such as the FLO, sharing in the potential profits of the Enterprise, financed by U.S. dollars. The treaty would apply to all nations, national fronts and other such groups holding Observer Status in the UN. 22

The United States' reasons for rejecting the treaty rest totally in dissatisfaction with Part XI of the treaty. The other parts of the treaty were and are not particularly objectionable. In fact, President Reagan stated in his rejection statement that the treaty "contains many positive and very significant accomplishments. Those extensive parts dealing with navigation and overflight rights and most other provisions of the treaty are consistent with United States interests and, in our view, serve well the interests of all nations. This is an important achievement and signifies the benefits of working together and effectively balancing numerous interests." 23

There seems to be a disconnect. Why is this treaty, supported by every presidential administration since LBJ's,

suddenly "fatally flawed". And if it is fatally flawed, why is President Reagan willing to abide by any of it?

CHAPTER VI

RECENT TRENDS 1983-1990

The United States' objections to the 1982 Convention on Law of the Sea are leveled solely at the Seabed portions of the treaty that would create the ISA-Enterprise combine to oversee mining of the deep seabed beyond national jurisdiction. Yet President Reagan conceded in his 9 July 1982 statement rejecting the treaty that the non-seabed portions of the treaty are more than acceptable to the United States. In fact, its provisions on transit passage through international straits and on preservation of navigation and overflight freedoms within the 200nm Exclusive Economic Zone (EEZ) are quite favorable to the United States as a global naval power.

So the question arises: is the United States, rejecting the treaty, throwing out the sea with the seabed? The answer to that question lies in a look at the trends in law of the sea negotiations since 1983.

The United States has chosen not to participate in any official negotiating forum on law of the sea since its adoption in December 1982. It could have been a member of the Seabed Preparatory Commission, even without signing the treaty, if it had so chosen. West Germany and Great

Britian, while non-signatories, are participating in Preparatory sessions and thus having some input into the development of infrastructure and interpretation of treaty wording.

Forty three nations have ratified the treaty as of December 1989. The Honorable Satya N. Nandan, United Nations Under-Secretary General for Ocean Affairs and Law of the Sea stated, in December 1989, that he expects the last (60th) ratification necessary to place the treaty into effect as international law, no later than the end of 1991.²⁴ The ratifiers are by and large poor Third World nations without a hope of getting the Enterprise off the ground by themselves, and they know it.

One of the most significant developments to date, in that regard, occurred at the conclusion of the summer meeting of the Preparatory Commission. Yugoslavia, current leader of the Group of 77 (the Third World block of nations) stated that his group "has always been ready and continues to be ready to hold discussions on any issue relating to the Convention and the work of the Commission and that any delegation or group of delegations, be they currently involved in the work of the Preparatory Commission or not, whether signatories to the Convention or not, were welcome to open a dialogue with the group of 77. This declaration is without any precondition other than the fact that those willing to talk must indicate a positive approach to serious

and meaningful talks. This has been our position and will continue to be our position."²⁵

Additionally, the wording of the annual General Assembly Law of the Sea Resolution changed significantly this year. It contained a number of additions, deletions and changes which reflect a widespread effort to move in the direction of meeting U.S. concerns with a view towards creating conditions for meaningful negotiations. A large number of LDCs have come to realize that the convention will not become effective without the participation of the major powers, including in particular the United States. Many of the developed nations are becoming concerned that should the Convention come into force they will be under extreme pressure to cut their own deals or lose the "pioneer status," a result damaging to the U.S. The deletions remove language suggesting U.S. conduct is unlawful or otherwise unacceptable, the changes eliminate what we oppose and the additions stress the importance of universal participation in the Convention which in context is intended to reflect positive non-aligned recognition in the Prepcom (Preparatory Commission) and elsewhere of the need to meet U.S. objections.²⁶ The United States Delegation to the United Nations believed that these concessions marked a real shift in the Third World position vis-a-vis U.S. concerns. They thought that while the movement was not yet great enough to elicit a "yes" vote on the resolution, it did seem enough

to facilitate an abstention. Ambassador Thomas Pickering requested such authority 17 November 1989. His request was denied in December, just prior to the vote.²⁷

There is some movement on the part of the Group of 77. More would be nice, but the salient question remains: What legal grounds will the United States have to remain outside the treaty, with respect to the deep seabed, while taking advantage of the good parts dealing with navigation and overflight rights? Can the United States continue to subscribe to "customary law of the sea" to buttress its case, once law of the sea gets a basis in international law, developed and supported by the vast majority of the world's nations? I think not.

CHAPTER VII

CONCLUSION/RECOMMENDATIONS

The United States, in continuing to reject the United Nations Conference on the Law of the Sea, has thrown the sea out with the seabed. The 400 plus articles of the treaty are not primarily, or even secondarily, about seabed mining. The real issue is whether, on balance, U.S. interests are better served by a broadly accepted agreement on the rules to be applied to a wide variety of ocean uses, most of them more important than seabed mining, or by being isolated with a view of customary international law which is uncertain in some areas and inapplicable in others.

In the 1960s, increasing numbers of nations were claiming jurisdiction, of one sort or another, out as far as 200 miles, undermining the concept of "freedom of the seas" beyond the narrow three mile territorial sea, a matter of vital strategic concern for the naval forces of the two superpowers. The problem was further complicated when the United Nations pronounced some, as yet undefined area, was the "common heritage of mankind" and called another law of the sea conference.

At the Conference, the U.S. achieved its major goals. First among these was the preservation of rights of transit

and overflight through international straits like Gibraltar, which would become territorial waters by an extension of the territorial sea from three to twelve nautical miles. Next, the territorial sea, with its restrictions of some degree on navigation, was limited to twelve nautical miles.

Finally, the U.S. got to eat its cake too: coastal states, of which the United States is one of the biggest, obtained rights to offshore resources in a 200nm EEZ, with protections provided for navigation and related high seas activities.

It should have been expected that in a negotiation of this magnitude, some quid pro quo would be exacted by the Third World LDCs. That quid pro quo was acceptance of the seabed mining "Enterprise." The crux of the matter is not whether the mining provisions are awkward, complicated and inefficient (they are), but whether the outcome is tolerable: Does the regime provide reasonably assured U.S. access to what may or may not someday be a viable source of needed minerals?

That answer, particularly in light of the recent movement towards reconciliation of U.S. objections on the part of the non-aligned nations, is "yes".

Many things have changed since 1983:

- The treaty no longer calls for mandatory transfer of technology, in order to mine.

- The production ceilings, once considered so onerous to the U.S., have been set high enough that they no longer pose a problem. 28

- For all intents and purposes the U.S., as the world's largest consumer of strategic minerals, would be guaranteed a seat on the ISA Council. 29

- The recent events in Eastern Europe suggest that the USSR would no longer be able to "count" on votes from the three East European seats on the Council. They will likely join the non-aligned group.

Yet, the United States continues to play the "power politics game", apparently believing that without it there is no treaty. That belief is wrong. There will be ratification of the treaty, probably in the next 2-3 years. When that happens, the allies that have stood by the U.S. will jump ship and ratify it, too, in order to retain the pioneer investor rights to seabed mining sites. Without ratification, West Germany will lose the Law of the Sea Tribunal Headquarters, a prestigious body they do not want to lose. One by one, all will sign in the face of overwhelming pressure from the majority of nations.

The world has changed and the United States must change with it. Parity among nations is diluting the power of the United States to unilaterally dictate what will or will not constitute law of the sea. Once the treaty is placed into

force the U.S. will not have a legal, or moral, leg to stand on that will allow it to pick and choose the provisions it likes, while foregoing the parts it doesn't like.

Its time to participate in law of the sea. The United States should send a delegation to the Preparatory Commission of the ISA and negotiate the most favorable interpretation of the rules that it can. It should initiate talks with the Group of 77, and anyone else who will listen, concerning modifying the mandate of the treaty.

Deep seabed mining should not be the problem it has been. The most optimistic prediction of commencement of any economically feasible mining operations is well into the next century (2025 AD).30

The United Nations Convention on Law of the Sea is a good treaty for the United States. It gives the U.S. the codification of navigation and overflight rights that are critical to its strategic security.

It is time for the United States to reassume the lead in world ocean policy.

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